

State of California



Fair Political Practices Commission

P.O. BOX 807 • SACRAMENTO, 95804 ••• 1100 K STREET BUILDING, SACRAMENTO, 95814

Technical Assistance
(916) 322-5662

•• Administration ••
322-5660

•• Executive/Legal ••
322-5901

•• Enforcement ••
322-6441

•• Statements of Economic Interest
322-6444

February 25, 1985

Gail Hutton
City Attorney
City of Huntington Beach
2000 Main Street
Huntington Beach, CA 92648

Re: Your Memo on Abstention
Our No. A-85-043

Dear Mr. Hutton:

This office is in receipt of your memorandum to your councilmembers regarding abstention due to disqualification pursuant to the Political Reform Act. While our advice remains as stated in the Densmore letter (No. A-84-247), your advice to your clients as to the statement which will satisfy the requirements of regulation 2 Cal. Adm. Code Section 18700(b) (5) is a satisfactory solution. That statement, to be made on the public record, is as follows:

I disqualify myself on this item per the requirements of the Political Reform Act.

As noted in your memorandum, we are in the process of considering revisions to regulation 18700. Your comments will be placed in our rulemaking file and will be taken into consideration as we proceed with deliberations on the modifications to the regulation.

Sincerely,

Robert E. Leidigh
Counsel
Legal Division

REL:plh



CITY OF HUNTINGTON BEACH

INTER-DEPARTMENT COMMUNICATION

FEB 11 9 42 AM '85

To Mayor Ruth Bailey and
Members of the City Council

From Gail Hutton
City Attorney

Subject Abstention Because of the
Political Reform Act

Date February 5, 1985

QUESTION: To what extent does a council member have to disclose his financial interests at the time he abstains from voting?

ANSWER: While the Fair Political Practices Commission guidelines are unclear on the subject, it appears that a simple abstention from a governmental decision because of the Political Reform Act is sufficient, and that specific factual disclosure is not required.

ANALYSIS:

The Political Reform Act says no official shall "make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest." (Government Code section 87100.)

The language plainly prohibits an official from influencing the agency's decision. It does not prohibit abstention or other nonaction as long as that does not constitute "participation" in the agency's decision. Obviously, no member of the Council can be compelled to vote; there is a right to abstain. (Roberts Rules, p. 345.)

In an attempt to interpret section 87100, the Fair Political Practices Commission has promulgated a guideline which says an official "makes a governmental decision" when he "determines not to act," unless the determination is made because of his financial interest. The decision includes voting on a matter. This obtuse language appears to be an effort to make bare abstention the making of a governmental decision. This, in our opinion, is based on a misreading of section 87100. The "governmental decision" is the action of the agency, not the individual council member's decision whether or not to vote. The statute prevails over a mere guideline promulgated by the Fair Political Practices Commission.

The guideline goes on to state that a decision not to act because of a financial interest must be accompanied by disclosure, to wit:

"When the determination not to act occurs because of his or her financial interest, the official's determination must be accompanied by disclosure of the financial interest, made part of the agency's official record or made in writing to the official's supervisor, appointing power or any other person specified in a conflict of interest code adopted pursuant to Government Code Section 87300."

This disclosure requirement suggests that disclosure must be made at the time the official's decision is made; it says that the official's determination must be "accompanied by disclosure pursuant to the conflict of interest code."

A reasonable application of the language quoted above would apply the disclosure requirement only to action on the agency's decision. The plain language encompasses administrative action by an official. For example, an agency decision by the director of Caltrans not to abandon a freeway route adjoining property in which he has an interest would clearly fall within the guideline and violate section 87100. Nonetheless, the guideline goes further and includes voting on a matter as a governmental decision. Such an application changes the focus of the decision from the agency's decision on the substantive issue to the official's intermediate decision on whether or not to vote on the agency's decision. As noted above, the extension of "governmental decision" to include a council member's decision to abstain on the ultimate governmental decision is arguably not supported by section 87100.

Nonetheless, the Fair Political Practices Commission's letter to Harold Densmore, Patterson City Attorney, asserts that a statement must be entered into the record that the official is disqualifying himself because it is reasonably foreseeable that the decision will have a material financial effect on an interest, source of income, or employment business entity. A copy of the letter is attached.

The guideline requirement might be an effort to control failure to vote where the result is, in effect, a negative vote. In that situation, the official "participates" by not voting or by "taking a hike." We suggest that this concern is more appropriately addressed in the guideline governing "participation" by an official than one dealing with "making a governmental decision." In fact, we are informed that the Fair Political Practices Commission is now in the process of considering revisions to this guideline.

The Densmore letter interprets the guideline to not require disclosure of any specific facts concerning financial interests or effects. It does, however, require a statement that the Political Reform Act is the reason for abstention. Such a statement might be:

"I disqualify myself on this item per the requirements of the Political Reform Act."

Such a statement should meet the requirements of the guideline. It also obviates the need for specific factual statements and avoids the more negative implications of the phrase "conflict of interest."

CONCLUSION:

Notwithstanding the Densmore letter, we suggest that the Political Reform Act is not violated by a mere abstention (or absence) as long as the official does not make, participate in, or attempt to influence an agency decision in which he has a financial interest. The guideline itself is of dubious validity to the extent it purports to make mere abstention the "making" of a governmental decision. Nonetheless, it is a simple matter to comply with the guideline as interpreted in the Densmore letter by announcing abstention because of the Political Reform Act. There is no need to state the specific factual basis for the possible financial effects.



GAIL HUTTON
City Attorney

cc: Diane Fishburn, Esquire
Fair Political Practices Commission

Attachment: FPPC letter to Harold Densmore

0389L

State of California



Fair Political Practices Commission

P.O. BOX 807 • SACRAMENTO, 95804 • JUNE 22 11 28 AM '84 K STREET BUILDING, SACRAMENTO, 95814

Technical Assistance • • Administration • • Executive/Legal • • Enforcement
(916) 322-5642 322-5660 322-5901 322-6441

October 15, 1984

Harold R. Densmore
City Attorney
City of Patterson
P.O. Box 51
Newman, CA 95360

Re: Advice Letter No. A-84-247

Dear Mr. Densmore:

Thank you for your request for additional advice on the conflict of interest provisions of the Political Reform Act.

QUESTION PRESENTED

If, under the provisions of the Political Reform Act, a city councilman must disqualify himself on a governmental decision, must the disqualification be accompanied by an announcement of the reason for the disqualification?

DISCUSSION

When a city councilman decides to abstain from participating in a decision because of his financial interests, the official's determination must be accompanied by the disclosure of the financial interest. This disclosure must be made part of the agency's official record. (2 Cal. Adm. Code Section 18700(b)(5).) It is sufficient for a city councilman to enter into the public record a statement that he is disqualifying himself on a decision because it is reasonably foreseeable that the decision will have a material financial effect on an "investment interest," "interest in real property," "source of income," or on a "business entity which he holds a business position."

ADVICE FILE SUMMARY SHEET

TYPE A STAFF Julia
YEAR 92 ADVISEE Bennett
NO. 239 REQUESTOR Lipps
DATE 10/29 AGENCY Redwood City

SUBJECT:

<input type="checkbox"/> c/i	<input type="checkbox"/> c/i code	<input type="checkbox"/> honoraria	
<input type="checkbox"/> campaign	<input type="checkbox"/> lobbying	<input type="checkbox"/> § 84308	<input type="checkbox"/> personal
<input type="checkbox"/> sei	<input type="checkbox"/> revolving door	<input type="checkbox"/> gift limits	<input type="checkbox"/> use
<input type="checkbox"/> mass mail	<input type="checkbox"/> co-sponsored	<input type="checkbox"/> prop 208	<input type="checkbox"/> misc
	events		

COMPUTER ENTRY SUMMARY: (no more than 5 typed lines for summary)

The executive director of a nonprofit has a conflict
in decisions to grant funds to the nonprofit. The
public generally exception applies to decisions
affecting entities competing for the same funds.
This letter also discusses the "nexus test."

CODE §§ AND REGULATIONS: § 7100, § 7103, 18705 3, 18707.4

ADD

BULLETIN SUMMARY: (for more space, write on back)

Disclosure of interest prompting disqualification
must be made with the same level of specificity
at least equal to the disclosure listed on the
officials statement of economic interests

*
See
below

SUPERSEDES: (Note if this advice letter supersedes others in whole or in part)

Hutton 85-043
Densmore 84-247

* Bulletin = computer + Bulletin